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IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 87.

AXEL W. HALLENBORG, *et al.*, *Appellants*,

vs.

COBRE GRANDE COPPER COMPANY, *et. al.*

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

SUPPLEMENTAL BRIEF FOR APPELLEES.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Of Counsel for Appellees.

BEN GOODRICH,
Of Counsel.

JUDD & DETWEILER, (INC.) PRINTERS, WASHINGTON, D. C.

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Supplemental Brief for Appellees.

The original brief of appellees presents full abstract of the pleadings, evidence and findings. Since its preparation by distant counsel brief for appellants has been filed. We briefly submit:

1. The Cobre Grande Copper Company capital stock consisted of 200,000 shares of the par value of $2.50 each (Findings I, Rec., 192), whereof about 15,049 shares were delivered by the holders to the defendant Gage, with voting power and the right to sell at his discretion. (Finding VII, Rec., 196.)

Two unsuccessful efforts were made by Gage to sell (1) to a syndicate, of which appellant Hallenborg was a member; and that failing, (2) to Hallenborg direct

ance is rendered *impossible* by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. If the parties have made no provision for a dispensation, the rule of law gives none.

Dermott vs. Jones, 2 Wall., 3.
Sun Printing & Pub. Asso. vs. Moore, 183 U. S., 654-5.
Reid vs. Alaska Pack. Asso., 73 Pac., 339.

The principle of *Dermott vs. Jones* has been applied in

Osborn vs. Nicholson, 13 Wall., 658.
Railroad Co. vs. Smith, 21 Wall., 263.
Tate vs. N. Y. Life Ins. Co., 1 Flipp, 320-337.
Texas, etc., Railroad Co. vs. Rust, 19 Fed., 242.
Fruin vs. Crystal Railway Co., 14 S. W. 559, 89 Mo., 407.
Warth vs. Mack, 79 Fed., 917.
Barrere vs. Somps, 45 Pac., 179; 133 Cal., 140-105.
Livingston vs. Anderson, 11 So., 273.
Steele vs. Buck, 61 Ill., 346—14 Am. Rep., 62.
McCreary vs. Green, 31 Mich., 180.
Nichol vs. Fitch, 72 N. W., 989.
Reichenbach vs. Sage, 43 Pac., 356.

And numerous other decisions, both in the Federal and State courts.

In *Klauber vs. San Diego Street Car Co.*, 30 Pac., 555, 95 Cal., 353, defendant undertook to excuse performance of the terms of his contract on the ground that he was prevented from doing so by the appointment of a receiver who took possession of the property. In other words, prevented by operation of law.

Mr. Justice Temple collects a number of authorities and says:

"The obligor contracts that he can and will con-
"trol the acts of third parties so far as necessary
"to enable him to perform his contract. People vs.
"Bartlett, 3 Hill, 570. Nor would it be a defense
"that the law has rendered it difficult or very ex-
"pensive to perform. The rule is, if performance
"*is in itself possible*, there is a breach, although the
"obligor himself may have become wholly unable to
"perform. The suit to foreclose a mortgage against
"the property of defendant, did not render per-
"formance impossible; defendant could have paid
"the claim or given security, and had the receiver
"discharged. To warrant the application of the
"principle, the *impossibility must consist in the*
"*nature of the thing* to be done, and not in the *in-*
"*ability of the party to do it;* or as it is sometimes
"termed, be an *impossibilitas rei*, as distinguished
"from an *impossibilitas facti*. If the thing could be
"*accomplished by any one with proper means and*
"*the requisite skill and knowledge, the promisor*
"*was not less answerable because it was impossible*
"*to him.*" Hare. Cont., 639. "The principle de-
"ducible from the authorities is, that if what is
"agreed to be done is possible and lawful, it must
"be done. Difficulty or improbability of accomplish-
"ing the undertaking will not avail the defendant.
"It must be shown that the thing cannot by any
"means be effected. Nothing short of this will ex-
"cuse non-performance." The Harriman, 9 Wall.,
172. "But it seems to me the very fact that the
"thing can be done, although it may be very ex-
"pensive, to wit, it may require the defendant to
"liquidate and pay an unjust claim, shows that per-
"formance is not prevented by operation of law."

"As between individuals, the impossibility which
"releases a man from the obligation to perform his
"contract must be *a real impossibility*, and not a
"mere inconvenience. And while such an impossi-
"bility *may release the party from liability to suit*
"*for non-performance*, it does not stand *for per-*

"formance so as to enable the party to sue *and re-*
"cover as if he had performed."

Smoot's Case, 15 Wall., 46.

It certainly cannot be argued with any seriousness that it was impossible in the nature of the thing for the Cobre Grande Company to make the payment of $37,500 due on November 26, 1899. Mere inability to pay does not excuse. Nor can it be contended that because Greene took possession of the property before the contract was due, that made it impossible for the Cobre Grande Company to pay, and was prevention within the meaning of the law.

Greene and Mitchell made such a contract as was agreeable to them. Time, as to payment, was made the essence of that contract. Mitchell and Cobre Grande Company have failed to comply with it, and no court has authority to make a new one, nor to change its terms and postpone the times of payment of the money due Greene upon that contract as plaintiff's seem to think. Courts cannot make contracts for parties; its mission is to enforce them. And it is settled beyond dispute that where a party complies in part with a contract and fails or refuses to comply with another part, that he cannot recover even the money that is paid in part performance.

Hansbrough vs. Peck, 5 Wall., 506-507, a case where time of payment of the purchase money was made the essence of the contract.

POINT VII.

The judgment entered in suit No. 3437 in the District Court of Maricopa County is not void and cannot be collaterally attacked.

The court had jurisdiction of the parties and of the

subject matter, and its judgment stands until reversed on appeal or until a new trial is granted. "A judgment is a vested right in the parties by whom it is recovered. If it is sought to review, correct, cancel, or annul it, it must be done either *in the court in which it is pronounced, or in the appellate tribunal.*"

York vs. Cartwright, 42 Texas, 141-2.
Voorhees vs. Bank of U. S., 10 Pet., 449.
Thompson vs. Tolmie, 2 Pet., 157.
Hall vs. Law, 102 U. S., 461.

The rule is, that while judgments of inferior courts must show jurisdiction, jurisdiction will generally be presumed in the case of Superior Courts; but, if want of jurisdiction appears on the face of the record of the judgment of a Superior Court, the judgment is void. Where there is jurisdiction in the court to act, its judgment, until reversed or attacked by some direct proceeding to annul it, is valid and cannot be collaterally attacked.

Forbes vs. Hyde, 31 Cal., 347-8-9.
Galpin vs. Page, 18 Wall., 350.
Voorhees vs. Bank of U. S., 10 Pet., 449.
Lamp Chimney Co. vs. Brass & Copper Co., 91 U. S., 659-661.
Hall vs. Law, 102 U. S., 461-464.
Mattingly vs. Nye, 8 Wall., 370.
Comstock vs. Crawford, 3 Wall., 396.

The important question then is, does want of jurisdiction appear on the face of the judgment rendered in the District Court of Maricopa County? To ask the question is to answer it.

Under the rule laid down in *White vs. Crowe* 110 U. S., 187, and other cases cited, plaintiffs would not be

"It is accordingly held that corporations of a private nature established solely for *trading* or *manufacturing* purposes may, by a vote of the majority of their members, against the protest of a minority, *wind up their affairs and close their business if in the exercise of a sound discretion*, they deem it expedient to do so; and may sell the whole of their property to a new corporation, taking payment in shares of the new corporation to be distributed among those of the old stockholders who are willing to take them," citing

Treadwell v. *Salisbury Man. Co.*, 7 Gray (Mass.), 393, 404; S. C., 66 Am. Dec., 490.

In this plain, and we submit controlling view, there is eliminated much unnecessary discussion in reaching a just conclusion in this case. The ownership of nearly ninety-four per cent. of the stock of this corporation could control its dissolution and as certainly properly control the proposition that doubtful and expensive litigation (the sole asset of the company) should cease. Otherwise an insignificant minority could compel the large majority to continue to sink money in a losing business, or as here demand that such majority imperil their *entire* holdings by the unsuccessful outcome of litigation and incur further liability and expense in carrying it on.

IV.

The foregoing view hence eliminates all discussion of the question of abuse of official power and duty, and thus frees this case from the mist of argument indulged in to show that at the demand of these plaintiffs, hold-

ing less than seven per cent. of the capital stock of this corporation, the holders of nearly ninety-four per cent. *must* continue litigation and incur additional corporate and individual expense in carrying it on, even to the extent of destroying the entire value of the capital stock upon the unsuccessful outcome thereof.

The plaintiffs claim as a controlling badge of fraud that Gage was paid by the purchasers of this stock, *in addition to the purchase price*, $50,000 for his services, labor and advances on the company's behalf. There is proof that every stockholder knew of this proposed payment. They all ratified it except these two holders of 13,000 shares out of 200,000. Hallenborg demanded from Gage that *his* option be kept by which he proposed to purchase this same stock at $2.50 per share. He was willing to *buy* at that figure, but condemns *Gage's* sale at that figure, *plus* an additional amount to cover all the company's indebtedness, to the manifest great advantage of the stockholders over Hallenborg's offer. The latter is not here suing to enforce *that* option, but to set aside a sale which netted to his co-stockholders far more than he offered. His record status is sufficient answer to his present position. But assuming *arguendo* that it could on this record and in this cause be held that this payment to Gage for his services, labors and advances should be returned to the stockholders, *all* would have the right to participate. On the basis of 200,000 shares such payment would equal 25 cents per share. Hallenborg could hence demand $2,000 on his 8,000 shares and his co-plaintiff, Addicks, $1,250 on his 5,000 shares. Certainly

they can not demand an accounting for all other stockholders who ratify Gage's actions *in their entirety* and are not hence asking any relief. And as neither *did* sell through Gage, he certainly received *nothing* on their account.

V.

The case of *Hallenborg* v. *Greene* (66 N. Y., App. Div., 596), cited on appellants' brief, must be fully read in order to understand its manifest limitations in respect of pending case. From the statement of the opinion therein it appears that the case was heard upon the complaint and sustaining affidavits alone, the affidavits presented in opposition thereto in the lower court having been, by stipulation, omitted from the record on appeal. The appellants on such record insisted that no case had been made justifying the injunction prayed, and that the appointment of the receiver to do more than take charge of the funds in dispute, then within the jurisdiction of that court, was too broad.

The opinion sets forth the allegations of the complaint as to the fraud, wrong, etc., perpetrated by Greene and Mitchell for the alleged purpose of destroying the Cobre Grande Copper Company. It set up as facts the allegations made in the bill in the present case, but without the material concessions found in the pleadings therein, and of course, wholly without the findings of fact which appear in the present case and which directly contradict these original averments.

It should be carefully noted, however, that the lan-

guage of the Court in the New York case, quoted on page 35 of the appellants' brief, is immediately followed by the Court's emphatic statement that a court of equity in New York is not the proper forum for the exercise of the general jurisdiction and the granting of complete relief sought and given in the lower court. The Court then proceeds to hold that the order of the lower court was too broad in enjoining the Cobre Grande Copper Company from collecting any debts, or paying out or disposing of any of its property or effects, and in appointing a receiver of all its property wheresoever situate, with the right to sue, etc. It did continue the temporary injunction restraining the further consummation of the alleged fraudulent contract and transfer of the mining properties in Mexico and the delivery of the deeds and title papers thereto, and for the adjustment of the actions pending in Mexico, Texas, and New York, after the transfer or delivery of the property involved in those actions, or the proceeds thereof; expressly discharged the Phoenix National Bank from any injunctive obligations, upon the obvious ground that it was not a party to that case, because not having been properly served. The Court (p. 599), then correctly rules that the court in Arizona, having general jurisdiction, had the power to grant all the relief prayed for generally in the bill. But finding $28,000 as proceeds of copper matte within its jurisdiction in New York, it affirmed the appointment of the receiver to preserve that fund *pendente lite* until final judgment in that cause. The order of the lower

court was modified, as thus indicated, and affirmed, *with costs to appellants.*

It will thus be clearly seen that the case heard and decided in the New York Court was so heard upon the complainant's *ex parte* allegations and showing, whereas, in the case at bar, and upon full proof, the findings both of the trial and appellate courts create an entirely different state of affairs, to which we respectfully submit the opinion of the New York Court can have no controlling application.

VI.

We submit the court below ruled correctly, and that its judgment should be affirmed.

Respectfully submitted.

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ALEXANDER BRITTON,
Of Counsel for Appellees.

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